SUPREME COURT OF KENTUCKY
No. 2013-SC-000541-D

WAGNER'S PHARMACY, INC. APPELLANT

ON REVIEW FROM THE KENTUCKY COURT OF APPEALS
versus No. 2012-CA-000573-MR

MELISSA K. PENNINGTON APPELLEE

BRIEF FOR APPELLEE

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true copy of this pleading upon Brian E. Clare, Esq., 600 West Main Street, Suite 300, Louisville, KY 40202, Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601, and Hon. Susan Schultz Gibson, Judge, Jefferson Circuit Court, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202, by mailing or hand-delivering the same to them upon this 8 day of December, 2014. I further certify that I have not removed the record of this case from the office of the Clerk of the Court of Appeals.

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INTRODUCTION

Plaintiff, now Appellee, Melissa Pennington, successfully appealed from a summary judgment dismissing her KRS 344.040(1) disability discrimination claims against Defendant, now Appellant, Wagner's Pharmacy, which has now appealed to this Court.

The Court of Appeals held that the law of disability discrimination, when coupled with the testimony of Appellee's expert witness, indicated that her claim should have been submitted to a jury; it ignored Appellee's "regarded as" claim of disability discrimination.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellee, Melissa Pennington, requests oral argument in this case so that she may have the maximum opportunity to persuade the Court that a jury should hear her case.

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EVEN IF SMYTH'S STATEMENT TO PARISH (AS ADMISSIBLE THROUGH THE TESTIMONY OF YOUNG, CALFEE, AND THE PLAINTIFF) WAS NOT DIRECT EVIDENCE OF DEFENDANT'S DISCRIMINATORY ANIMUS AGAINST THE PLAINTIFF, IT WAS CERTAINLY SUFFICIENT EVIDENCE OF "PRETEXT" TO GET THE PLAINTIFF'S CASE TO A JURY.

STATEMENT OF THE CASE

Facts

The Plaintiff/Appellee, Melissa Pennington, is a 47-year-old female. During her entire life she has been "morbidly obese." Until she had bariatric surgery, which was after the events that gave rise to this lawsuit took place, Ms. Pennington weighed 425 pounds and was 5' 4" tall (Transcript of Record, hereinafter TR, P. 212; Appendix to this Brief, hereinafter APX, P. 15). Because of her weight, Pennington has suffered from diabetes and breathing difficulties, most notably sleep apnea (Deposition of Dr. Edwin Gaar, Vol. II, Pp. 16-17). In fact, Dr. Gaar testified that Pennington had to use a breathing machine in order to sleep at night. She also has considerable difficulty simply doing everyday chores (*Id.*, P. 18).

Because of her diabetes, Ms. Pennington, "... often presented with a classic, raccoon-like darkening around her eyes, perhaps giving her a 'dirty' appearance," in the words of the Circuit Court (TR, P. 212; APX, P. 15).

Dr. Gaar is a surgeon who has performed 2,000 bariatric surgeries (Gaar Depo., Vol. II, P. 8). He testified that Ms. Pennington had a Body Mass Index of "over 70," before he performed a gastric by-pass on her (i.e., when she weighed 425 pounds) [*Id.*, P. 13]. Dr. Gaar also testified than any Body Mass Index over 40 indicates that an individual is "morbidly obese;" and that anybody with a Body Mass Index of over 50, "... would be considered to be super obese," (*Id.*, P. 13).

An individual in the latter category, according to the doctor, would be looking at a reduction of fifteen years in his or her life expectance (*Id.*, P. 14). There is no cure for the sort of obesity that Ms. Pennington suffers; the gastric by-pass that Dr. Gaar performed on Ms. Pennington only reduced her Body Mass Index to about 55 (TR, P. 133), and her weight only to 325 pounds.

Dr. Gaar averred that:

> ... morbid obesity is a physical disease process and it is caused ...by a series of physiological factors, including metabolic, hereditary, environmental and ... having to do with a person's ability to take in food and process it (Gaar Depo., Vol. II, Pp. 9-10).

Dr. Garr described the immutability of the condition of a "super obese" individual as follows:

> I could take two people, one who is morbidly obese and one who is not. I could wire both your mouths shut, put you in cages, feed [both of you] the exact same caloric diet. The skinny [individual] would lose weight, and the morbidly obese patient would gain weight (*Id.*, P. 10; see also P. 22).

* * * * * * * * * * * * * * *

From about 1997 until April 26, 2007, the Defendant/Appellant, Wagner's Pharmacy, employed Ms. Pennington.

Wagner's is a Louisville landmark: a drug store/short order restaurant that sits right outside one of the entrances to Churchill Downs and enjoys a steady stream of horsemen and hangers-on in addition to its regular customers.

Ms. Pennington's job for Wagner's was to park a food truck on the backside

of the race track and wait on customers. Her supervisor was Martha Parrish. Brenda Smyth was Parrish's boss, known as the "owner's manager," (TR, P. 212; APX, P. 15).

Pennington was never disciplined during the decade that she worked for Wagner's. Indeed, so far as the record of this case indicates, none of her bosses ever so much as told her that there were any problems with her job performance.

Given that Brenda Smyth and Melissa Pennington had different work sites, they rarely saw each other. Except that one day shortly before Smyth ordered Martha Parrish to fire Pennington, Ms. Pennington came into Wagner's office to pick up her paycheck. It was Pennington's "off day," and she was, "... dirty and not in my best appearance," on this day because she had been doing some moving (TR, P. 124, #6; P. 213; APX, P. 16). Pennington testified that her appearance on this day was an anomaly, and that she did not come to work "looking like this," (*Id.*).

Except, of course, for the, "... classic, raccoon-like darkening around her eyes," (TR, P. 212; APX, P. 15); which never went away.

Apparently it was a result of this rare meeting between Pennington and Smyth that Smyth decided to fire Pennington.

* * * * * * * * * * * * * * *

On April 26, 2007, Pennington's boss, Martha Parrish, told Pennington that Wagner's was firing her (TR, P. 213; APX, P. 16).

Ms. Parrish testified that she did this on orders from Brenda Smyth (*Id.*).

The parties dispute the substance of what Smyth told Parrish on this occasion.

Ms. Parrish testified that Ms. Smyth told her to tell Pennington that Wagner's was firing her because of Pennington's "personal appearance," (*Id.*).

Pennington testified that Ms. Parrish told her that Ms. Smyth had told Parrish to fire Pennington because Pennington was dirty and overweight (Pennington Depo., Pp. 128-129; TR, Pp. 76, 92).

Pennington presented two witnesses who also contradicted Ms. Parrish's account. As the Circuit Court described this evidence:

> Plaintiff's co-worker, Vicky Young, asserted that Parrish stated that Ms. Smyth "asked" Ms. Parrish to terminate Plaintiff due to Plaintiff being "dirty, overweight and [because she] could not do her job." Likewise another co-worker, Tanya Calfee, asserted that Ms. Parrish was crying on the day Plaintiff was terminated and told Ms. Calfee that Ms. Smith "instructed" Ms. Parrish to fire Plaintiff "because of [Plaintiff's] weight and because she was dirty," and Ms. Parrish could not bring herself to do it (TR, P. 213; APX, P. 16).

There are only two errors in this summary. Obviously, both Calfee and Young did not merely "assert" what Ms. Parrish told them, respectively. They testified to it. Their affidavits may be found at TR, Pp. 121-122, 126-127.

* * * * * * * * * * * * * * *

After Wagner's fired Pennington, it came up with somewhat more colorable reasons for doing this than that provided by the testimony of Plaintiff and her

witnesses, or even Ms. Parrish.

In response to Plaintiff's Interrogatories, Ms. Smyth, on behalf of Wagner's, testified that:

> Sales on the backside had declined significantly and the general condition of the truck utilized by Plaintiff necessitated that it be repaired or replaced. Wagner's believed that the decline in sales was due in part to a failure of the Plaintiff to generate sufficient sales to justify continued use of the truck on the backside. By way of example, Wagner's received information showing that Plaintiff failed to move the Wagner's vending truck to different locations on the backside, thereby generating more sales (TR, Pp. 13-14).

Procedural History

Pennington sued Wagner's in the Jefferson Circuit Court on June 7, 2007 (TR, Pp. 1-6). She alleged that Wagner's fired her because she was a disabled individual and/or because Wagner's had a false perception that she was disabled, in violation of KRS 207.150 and KRS 344.040 (*Id.*, TR, P. 213; APX, P. 2).

After considerable discovery, the Defendant Wagner's moved for summary judgment on June 11, 2011 (TR, Pp. 68-97A).

It argued that Pennington was not disabled because she could perform her job in the food truck without any restrictions, and because her obesity was not a "physical impairment," substantially limiting any of her major life activities, and that Pennington's morbid obesity had no "physiological cause," (TR, Pp. 70-75).

Wagner's argued that Pennington was not perceived or regarded as disabled because:

1. Of the same reasons that she was not disabled (TR, Pp. 74-75), especially that, "Plaintiff admits there is no physiological cause for either her weight or diabetes," (*Id.*)

2. She could not show that Wagner's regarded her as being impaired to do a broad range of jobs, or even her particular job (TR, P. 76); and

3. Her only evidence to support this claim was, "her own claim that an offhand remark was made;" namely her testimony that "... her former supervisor, Martha, later told her the owner fired her for being overweight and dirty," (TR, P. 76). According to the Defendant, this testimony was "hearsay and inadmissible," and it was contradicted by Parrish's testimony (*Id.*).

In response (TR, Pp. 101-127), Plaintiff presented the affidavits of Calfee and Young. Again, in these affidavits both of the witnesses testified that Martha Parrish had told them that Parrish had told them that Smyth wanted Pennington to be fired because Smyth believed that Pennington was, "dirty, overweight, and could not do her job," in Young's words (TR, P. 121); or, "because of Missi's weight and because Missi was dirty," in Calfee's words (TR, P. 127).

* * * * * * * * * * * * * * *

The Circuit Court agreed with the Defendant.

It held that the testimony of Young and Calfee was "inadmissible hearsay," (TR, P. 235; APX, P.28). It disregarded Pennington's own testimony, which mirrored that of Calfee and Young. It concluded that Pennington could not prove discriminatory animus or that Defendant's articulated reasons (post-event though they were) were a "pretext" for discrimination (TR, Pp. 234-235; APX, Pp. 27-28).

The Court's analysis of the testimony of Young and Calfee, in addition to wrongly characterizing it as "assertions," did not mention KRE 801A; but only KRE 801(c), KRE 802, and KRE 803 (TR, Pp. 233-235; APX, Pp. 26-28).

So, in a timely filed CR 59.05 motion (TR, Pp. 230-239), the Plaintiff pointed out the existence of KRS 801(A) to the Court. Plaintiff argued that this rule [specifically KRE 80lA(a)] indicated that the testimonial statements of both Young and Calfee (and Pennington) were admissible (TR, Pp. 230-233). Plaintiff also reiterated that both Young and Calfee testified that Martha Parrish was crying and upset when she made her statement to them, repeating what Brendan Smyth had told her. Thus, argued the Plaintiff, the testimony of Young and Calfee was also admissible under KRE 803 (1), 803(2), and 803(3) [TR, P. 233].

The Plaintiff also directed the Court's attention to the testimony of the bariatric surgeon, Dr. Gaar. He stated under oath that Pennington's "super morbid" obesity was a result of physiological factors (TR, P. 233), and basically immutable. He also testified that Pennington's state of overweight impaired her ability to

engage in daily activities, especially those that involved breathing and sleeping (*Id.*., Gaar Depo., Vol. II, Pp. 17-18).

Plaintiff also argued that the post-discharge and "evolving" nature of Defendant's colorable articulated reasons for firing Pennington, along with their incredibility, showed pretext in this case without regard for the testimony of Young, Calfee, and Pennington herself as to what Wagner's managers had said about their reason for firing Pennington (TR, Pp. ,236-237).

The Circuit Court was not swayed. In an opinion dated March 1, 2012 (TR, Pp. 252-257; APX, Pp. 31-36), the Court held that any effort to apply KRE 801(A)(a) in this case must fail because the testimony of Young and Calfee about Smyth's statement to Parrish (who reported the statement to Young and Calfee) was "double hearsay," and therefore inadmissible. This was because, according to the Court, "double hearsay:"

> . . . is inadmissible unless each part of the combined statements conforms to a recognized exception to the hearsay rule (TR, P. 253; APX, P. 32).

This was a quote from *Manning v. Commonwealth*, 23 S.W.3d. 610, 614 (Ky., 2000) [*Id.*].

Since the Circuit Court had ignored KRE 801A(a) in its first opinion, it is perhaps not surprising that it ignored KRE 801(a)(b) in its second opinion. This subsection of the role, when read in combination with KRE 801A(a), clearly

indicates that the testimony of Young and Calfee and Pennington was, indeed, admissible.

Plaintiff, Melissa Pennington, appealed the adverse Orders of the Circuit Court on March 26, 2012 (TR, P. 260).

***** ***** *****

On July 12, 2013, the Court of Appeals vacated the summary judgment against Pennington and remanded her case to the Circuit Court for further proceedings—a trial by jury (Opinion of the Court of Appeals, this Brief, Appendix [APX], Pp. 1-15).

The Court exhaustively reviewed the relevant statutory and case law and the relevant federal regulations regarding disability discrimination in its Opinion (APX, Pp. 4-7). Both parties and the Circuit Court had referenced all of these provisions in their respective analyses and arguments, in a manner similar to the Court of Appeals. So there is no controversy as to what the law is in this case.

This body of law requires an obese individual to prove that his obesity is, "… the symptom of a physiological disorder," which has impaired one or more of the "body systems," as enumerated in the relevant federal regulations (*Id.*, Pp. 7-8), which substantially limits a major life activity (*Id.*, P. 6).

The Court of Appeals disagreed with the Circuit Court's conclusion that Pennington had failed to prove these elements of her disability discrimination

claim (*Id.*, Pp. 7-8). Thus it held that she had established a prima facie case of such discrimination (*Id.*, Pp. 8-9).

The Court of Appeals then proceeded with the remaining two portions of the analysis first applied to discrimination cases generally in the case of *McDonnell-Douglass v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d. 68 (1973), as restated in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d. 207 (1981) [APX, Pp. 9-10]. This analysis is applied to most discrimination cases based upon purely circumstantial evidence.

After the plaintiff has proved his prima facie case, the defendant may attempt to articulate a "legitimate nondiscriminatory reason," for its challenged employment action. Then the plaintiff may prove that this articulated reason is really a "pretext" for discrimination (*Id.*, Pp. 9-10).

The Court of Appeals held that the Defendant's articulation that Pennington had been failing to generate sales met is minimal burden of articulation.

However, it also held that Pennington's evidence of pretext was sufficient to get her case to a jury.

The Court pointed to the non-specific nature of Pennington's boss's contemporaneous reason for firing her: Pennington's "personal appearance," (*Id.*, Pp. 10-12) and the fact that the Defendant's more colorable reasons for firing Pennington (declining sales, etc.) only surfaced *after* the decision to fire her had

been made (*Id.*, P. 12).

The Court of Appeals also concluded the Pennington's evidence that the Defendant's decision-maker, Brenda Smyth, had told Martha Parrish to fire Pennington because she (Smyth) believed that Pennington was "overweight and dirty," was admissible hearsay (*Id.*, Pp. 13-14), that served to prove that Wagner's articulated reason(s) for firing Pennington were a pretext for disability discrimination(*Id.*).

***** ***** *****

The Defendant, now Appellant, then sought discretionary review from this Court.

Wagner's Pharmacy framed the issue for review as:

> ...whether Dr. Gaar's general testimony regarding morbid obesity, although unrelated to Respondent's specific morbid obesity, is sufficient to allow Respondent to establish a prima facie case of disability discrimination (Motion for Discretionary Review, Pp. 2-3).

On August 13, 2014, this Court granted Wagner's Pharmacy's motion for discretionary review. Wagner's Pharmacy filed its brief as Appellant on October 13, 2014.

STANDARD OF REVIEW & PRESERVATION OF ERROR

Obviously, Plaintiff preserved her objections to the Circuit Court's error in granting summary judgment for review by opposing the motion in formal plead-

ings.

The standard of review here is de novo, *Brooks v. American Broadcasting Co., Inc.*, 999 F.2d. 167 (6th Cir.), cert. denied, 115 S.Ct. 609, 126 L.Ed.2d. 547 (1993). This standard of review requires that this Court, now acting as the first level appellate Court, look at the case as though it were the Circuit Court deciding the motion for summary judgment in the first instance. Of course, this Court must also draw all inferences in favor of the party appealing from the summary judgment, and take a completely "fresh look" at the facts and law of the case, *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d. 476 (Ky., 1991).

ARGUMENT

Introduction: The Law of Disability Discrimination in Employment

Again, there has never been any sort of dispute in this case as to what the law is. We have examined some of the parameters of this law, but we should now review it in more detail.

The Court of Appeals set forth the requirements for a plaintiff seeking to establish a case of disability discrimination under KRS 344.040(1), which prohibits discrimination against individual with a disability in employment, by citing the case of *Hallahan v. The Courier-Journal*, 138 S.W.3d. 699, 706 (Ky. App., 2004). These requirements are as follows:

> ... the plaintiff must show: (1) that [she] had a disability as that term is used under the statute; (2) that [she] was "otherwise qualified"

> to perform the requirements of the job with or without reasonable accommodation; and (3) that [she] suffered an adverse employment decision because of the disability, *Id.*

Neither the Circuit Court nor the Defendant itself argued that the Plaintiff was not qualified to perform the requirements of her job with or without reasonable accommodation. Any such argument would be unavailing, as the Plaintiff successfully performed the job she held with the Defendant for ten years. While it is true that, post-discharge, the Defendant came up with purported reasons for firing the plaintiff, these may not be used to defeat the "qualified" (or "meeting the employer's legitimate expectations") element of a plaintiff's prima facie case, see *Wexler v. White's Furniture*, 317 F.3d. 564, 574-576 (6th Cir., 2003); and *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d. 654, 659-660 (9th Circ., 2002).

Also, there is no dispute in this case that Plaintiff suffered an adverse employment decision. This is because Defendant discharged her, a decision that is specifically mentioned in KRS 344.040(1).

The issue in this case, therefore, is whether or not the Plaintiff, "... had a disability as that term is used under the statute," namely the relevant provisions of KRS chapter 344, *Hallahan, supra.*

KRS 344.010(4) tells us that an individual is disabled, if he or she:

> (a) [has] a physical or mental impairment that substantially limits one (1) or more of the major life activities of the individual;
>
> (b) [has] a record of such impairment; or

(c) [is] being regarded [by his employer] as having such an impairment.

As the Circuit Court noted, Kentucky Courts look to federal case law and statutory-related authorities (such as the administrative regulations of the United States Equal Employment Opportunity Commission [EEOC]), in interpreting the Kentucky Civil Rights Act's prohibition against discrimination on the basis of an individual's disability (TR, Pp. 261-217; APX, Pp. 19-20).

The Circuit Court and the Court of Appeals quoted several administrative regulations adopted by the EEOC that address this issue, and correctly so.

First off, these regulations tell us that a "physical or mental impairment" is 29 Code of Federal Regulations (C.F.R.) §1630.2(1):

> (1) Any physiological disorder, or condition, domestic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs) cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; or
>
> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The regulations next indicate that, "Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working," 29 C.F.R. §1630.2(i).

Continuing, the regulations tell us that the term "substantially limits" means

that an individual is:

> (1) Unable to perform a major life activity that the average person in the general population can perform; or [is],
>
> (2) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity,

29 C.F.R. §1630.2(j)(1).

Finally, the regulations point us to the following factors to be considered in determining whether an individual is "substantially limited" in a major life activity:

> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment,

29 C.F.R. §1630.2(j)(2).

Applying these principles to the facts of this case, it is obvious, that the Plaintiff, Melissa Pennington, proved a prima facie case under both KRS 344.010(4)(a) and (c). Furthermore, she either had no need to prove that the stated reason of the Defendant, Wagner's Pharmacy, was a "pretext" for disability discrimination or submitted sufficient evidence of pretext to get her case to a jury of her peers.

I

THE PLAINTIFF PRESENTED SUFFICIENT PROOF OF A PRIMA FACIE CASE OF DISABILITY DISCRIMINATION UNDER KRS 344.010(4)(a) TO SURVIVE A MOTION FOR SUMMARY JUDGMENT.

The Circuit Court opined that the law permits recovery in cases where an individual claims that her obesity is a disability only, "... where the obesity relates to a physiological disorder," (TR, P. 218; APX, P. 21). The Court claimed of Plaintiff's expert witness that, "... nowhere in Dr. Gaar's deposition is there testimony that there is a physiological cause for Plaintiff's obesity," (TR, P. 219; APX, P. 22).

As we have seen, this is simply not true. Dr. Gaar specifically affirmed that, "... morbid obesity is a physical disease process that is caused by a series of physiological factors," (Dr. Gaar Depo., Vol. II, Pp. 9-10; This Brief, supra, P. 2).

Just to be on the safe side, the Circuit Court did not confine its reasons for rejecting Plaintiff's claim to this particular and obvious mistake. It also opined that:

> . . . even if Plaintiff had proven that her obesity was a qualified disability, there is nothing of an evidentiary nature which establishes that she was substantially limited in conducting "major life activities" prior to and at the time of her termination (TR, P. 220: APX, P. 23).

Again, this is wrong.

As previously noted, Dr. Gaar testified that Plaintiff's ability to breathe was so severely restricted when she weighed 425 pounds that she could only sleep with

the aid of a breathing machine.

Breathing is a major life activity per 29 CFR §1630.2(i) [this Brief, *supra*, Pp. 9-10]. The same is true of sleeping, even if the EEOC does not include it among its list of other major life activities As Dr. Gaar testified, "Actually, nobody has ever died from lack of sleep per se, but you would feel pretty rotten if you couldn't go to sleep," (Dr. Gaar Depo., Vol. II, P. 17).

Furthermore, Dr. Gaar testified that Plaintiff had considerable difficulty performing everyday tasks because of her obesity. This difficulty implicates the major life activities of caring for one's self and performing manual tasks per 29 C.F.R §1630.2(1).

Finally, as the Circuit Court noted, "The ultimate determination of whether the impairment substantially limits a major life activity generally is a factual issue for the jury..." (TR, P. 216; APX, P. 19), citing *Hallahan*, *supra*, at 707. Thus the Circuit Court's deciding this issue was as much an error as its taking it upon itself to declare that the Plaintiff was not disabled or impaired.

Fortunately, the Court of Appeals agreed with the Plaintiff's arguments on this issue (APX, Pp. 7-9).

***** ***** *****

Again, the Appellant has never argued with the law of disability discrimination.

Its theory, which the Circuit Court adopted, is that the testimony of the Plaintiff's expert, Dr. Gaar, was too "vague and non-specific" to be relied upon to show that Missy Pennington's obesity is the result of a physiological disorder (Appellant's Brief, P. 7).

Since this argument itself is rather "vague and non-specific," Appellant listed six objections to reaching the conclusion that Pennington was disabled from Dr. Gaar's testimony. They are that:

1. Dr. Gaar had never treated Ms. Pennington when he gave his deposition;

2. Dr. Gaar never gave Ms. Pennington a "comprehensive physical examination;"

3. Dr. Gaar only read Pennington's treatment records for the year during which he gave his deposition;

4. Dr. Gaar did not consult with Ms. Pennington's treating physician before he gave his deposition;

5. Dr. Gaar was unaware if Pennington suffered from any genetic disorders; and

6. Dr. Gaar testified that, "Nobody has been able to elucidate the cause of anybody's morbid obesity anywhere in the world;" (*Id.*, Pp. 8-9).

None of these objections to Dr. Gaar's testimony serve to disqualify it as proof in support of Missy Pennington's claim that she was, at the time of this lawsuit, a qualified individual with a disability.

Appellant has cited no authority for the proposition that an expert medical witness need do anything beyond what Dr. Gaar testified to in this case. Expert medical witnesses are often not the "treating" physician. They often base their testimony upon the plaintiff's medical records and their knowledge of the plaintiff's medical issues, and nothing more. They often do not consult with the treating physician, as this individual is often a party-defendant.

Dr. Gaar's testimony, as recited in ¶6, above, merely serves to justify the "non-specific" nature of his testimony about Missy Pennington. When confronted with an individual as grossly overweight as Ms. Pennington was, it is impossible to state a cause for her problem specific to her. A physician is left with the general causes of the condition which, according to Dr. Gaar, include a "series of physiological factors."

We must not forget that Ms. Pennington was not merely obese or even "morbidly" obese. She was, according to Dr. Gaar, "super" morbidly obese, both before and after the gastric bypass surgery that he performed on her after the events that gave rise to this lawsuit (This Brief, Pp. 1-2). Because of the fortunate rarity of this condition, general principles are applicable to all persons unfortunate

enough to suffer from it.

Again, Dr. Gaar was adamant that there was no cure for Pennington's condition. Obviously, a physician can treat the symptoms such as diabetes and breathing difficulties to some extent; but even after bariatric surgery, they remain so long as the individual remains super morbidly obese.

Also, while neither Dr. Gaar nor any other physician is able to isolate what specifically causes super morbid obesity in any particular individual, it remains a fact that this form of obesity is:

> ... a physical disease process and it is caused... by a series of physiological factors, including metabolic, hereditary, environmental and... having to do with a person's ability to take in food and process it (Gaar Depo., Vol. II, Pp. 9-10; See also APX, P. 7).

Dr. Gaar's testimony included all of the relevant medical knowledge that Missy Pennington could have presented in support of her claim that she was a qualified individual with a disability. It was clearly sufficient to prove this. The Court of Appeals correctly recognized this, and its decision upon this particular claim of Pennington should be affirmed.

II

THE PLAINTIFF PRESENTED SUFFICIENT PROOF OF A PRIMA FACIE CASE OF DISABILITY DISCRIMINATION UNDER KRS 344.010(4)(c) TO SURVIVE A MOTION FOR SUMMARY JUDGMENT.

Plaintiff believes that she proved not only that she was actually disabled, but that the Defendant "regarded her as disabled" as well. Certainly, she provided

sufficient evidence to survive the Defendant's motion for summary judgment on this issue.

Hallahan, supra at 707-708, informs us what a plaintiff must prove in order to get a "regarded as" disability claim to a jury. She must prove that her employer:

> 1) ... mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities; or that an actual, non-limiting impairment substantially limits one or more [of the person's] major life activities.

The purpose of the "regarded as" prong of the disability discrimination statute is to cover individuals who are rejected or discharged from a job because of, ". . . the myths, fears, and stereotypes associated with disabilities," *Id.*, at 708.

The Circuit Court rejected this alternative theory of the Plaintiff's because of a purported lack of proof from which a jury could, "... even infer that she was 'regarded' as having a disability," (TR, P. 221; APX, P. 24).

In order to justify its rejection of Plaintiff's "regarded as disabled" theory of the case, of course, the Circuit Court had to reject the evidence that Wagner's "owner's manager," Brenda Smyth, stated to Martha Parrish that she was firing Plaintiff because Plaintiff was, "dirty, overweight, and could not do her job." (TR, P. 213; APX, P. 16).

The Court rejected this evidence upon the basis that it was inadmissible hearsay.

This was not so. The form in which the Plaintiff presented the evidence of

Smyth's statement did not constitute inadmissible hearsay at all.

Again, when pushed, the Circuit Court did acknowledge that Young and Calfee could testify about what Martha Parrish told them under the provisions of KRE 801(A)(a). However, the Court, in its second Memorandum Opinion, continued to reject Young and Calfee's testimony about what Smyth had told Parrish. Its "backup" ground for this conclusion was that the statements at issue constituted "double hearsay," (TR, P. 253; APX, P. 32; This Brief, *supra*, P. 7), and could not, therefore, be used to prove the truth of Smyth's incriminating statement to Parrish (*Id.*).

The Court did acknowledge that "double hearsay" is admissible where, "... each part of the combined statements conform to a recognized exception to the hearsay rule," (*Id.*). Again, it admitted that the second part of the combined statement was admissible under KRE 80lA(a). However, the Court failed to analyze the first part of the statement (Smyth's statement to Parrish) to see if it was independently admissible under some exception to the hearsay rule.

Of course, the first part of the combined statement was admissible, as it clearly conformed to a recognized exception to the hearsay rule, namely that set forth at KRE 801A(b)(4).

This rule provides as follows:

> (b) Admissions of parties. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness,

if the statement is offered against a party and is:

. . . . . .

> (4) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship.

Clearly, Smyth was Wagner's agent or servant in the matter of Pennington's discharge from Wagner's employment; and was so acting when she made the statement to Martha Parrish that the Plaintiff has sought to admit into evidence through Young, Calfee, and herself. Indeed, so far as the record of this case shows, it was Smyth who alone made the decision to fire Pennington.

Thus Plaintiff has shown that each part of the combined statements at issue here conform to a recognized exception to (or here an exclusion from) the hearsay rule, as required by *Manning v. Commonwealth*, 23 S.W.3d. 610, 614 (Ky., 2000).

Thurman v. Commonwealth, 23 S.W.3d. 610, 614 (Ky., 2000) is an example of a case in which double hearsay led to a criminal conviction.

The Court of Appeals agreed with the Plaintiff/Appellee on this important evidentiary point (APX, Pp. 13-14).

The Appellant, Wagner's Pharmacy, has not challenged this conclusion in either its motion for discretionary review or its Brief now before this Court.

Ms. Smyth's statement to Parrish that Wagner's was firing the Plaintiff because the Plaintiff was "overweight, dirty, and could not do her job," directly (on

the face of it) proved Smyth's belief that Pennington's super obesity disqualified Pennington from doing her job, i.e., that Pennington was disabled in that her being overweight substantially limited Pennington's major life activity of working for Wagner's Pharmacy, *Hallahan, supra.*

Although the statement at issue here is not ambiguous, even if it were the task of disambiguating it would be for the jury, and not the Court, *Huff v. UARCO, Inc.*, 122 F.3d. 374, 384-385 (7th Cir., 1990).

Appellant argues that even in the face of Pennington's direct evidence that the individual who decided to fire her, Brenda Smyth, did so because Smyth believed that Pennington was too large to do her work, Pennington is not entitled to get her case to a jury. It presents two arguments.

One is that Pennington had to prove her "perceived disability claim through expert testimony." Appellant attacks Dr. Gaar's testimony in support of Pennington's perceived disability claim upon the same basis that it attacked this testimony as to Pennington's claim of simple disability discrimination (Appellant's Brief, Pp. 16-18).

This argument is meritless because a plaintiff needs no expert testimony whatsoever to prove a claim of perceived disability discrimination. *Hallahan, supra*, 183 S.W.3d. at 707, teaches us that such a claim is proven by reference to the employer's *beliefs* about the plaintiff's condition, and not the objective truth

about the plaintiff's condition. The plaintiff does not need a medical expert to establish this element of his or her case.

Appellant's other argument against Plaintiff's perceived discrimination claim consisted of its pointing to the legal principle that a plaintiff must prove that his employer perceives not only that the plaintiff is disabled as to a particular job, but also as to, "... either a class of jobs or a broad range of jobs," (TR, P. 77; Appellant's Brief, Pp. 14-17). Appellant has argued that Smyth's statement evinced *only* a belief that Plaintiff was disqualified from her particular job.

Of course, this is preposterous.

The operator of a food truck takes orders, makes change, and hands over food to customers. Perhaps she also stocks the truck.

This is the same daily drill that thousands of retail cashiers who labor at places such as grocery stores, self-service gasoline and "department" stores, and related places of business perform in their jobs.

If one cannot work in a food truck because of one's disability, one is, ipso facto, disqualified from an entire class and a broad range of almost identical jobs in retail commerce.

* * * * * * * * * * * * * * *

The significance of the testimony about Smyth's statement is this: such direct evidence of discriminatory evidence, by itself, is sufficient to get any

employment discrimination case to a jury, period. There is no need to jump through the three-phase model of proof (prima facie case; defendant's legitimate articulated reason for its act adverse to the plaintiff; plaintiff's effort to prove that the reason is pretextual) set forth in *McDonnell-Douglass v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d. 68 (1973), *DiCarlo v. Potter*, 358 F.3d. 408, 422-423 (6th Cir., 2004); *Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d. 1241, 1246 (6th Cir., 1995).

Thus the fact that the testimony of Young, Calfee, and the Plaintiff, about Smyth's statement to Parrish and Parrish's statement to them was admissible, meant that it was also sufficient to get Plaintiff's "regarded as" disability discrimination case to the jury. The Circuit Court should not have dismissed this particular claim upon Defendant's motion for summary judgment.

III

EVEN IF SMYTH'S STATEMENT TO PARISH (AS ADMISSIBLE THROUGH THE TESTIMONY OF YOUNG, CALFEE, AND THE PLAINTIFF) IS NOT DIRECT EVIDENCE OF DEFENDANT'S DISCRIMINATORY ANIMUS AGAINST THE PLAINTIFF, IT IS CERTAINLY SUFFICIENT EVIDENCE OF "PRETEXT" TO GET THE PLAINTIFF'S CLAIMS TO A JURY.

Proof of "Pretext" is required only in cases where a plaintiff has no direct evidence of discriminatory animus. The pretext phase of such a circumstantial case is the third one; it comes after the defendant has articulated a "legitimate non-discriminatory reason" for the adverse act of which the plaintiff complains and

after the plaintiff has proven his "prima facie" case, *McDonnell-Douglas*, *supra*, 411 U.S. at 802-803.

Even if we assume that Smyth's statement that she was firing Pennington because Pennington was dirty, overweight, and could not do her job was somehow not direct evidence of discriminatory animus, it was certainly sufficient evidence of pretext to get Pennington's disability discrimination case to a jury, *Johnson v. Kroger Co.*, 319 F.3d. 858, 868 (6th Circ., 2002; see also *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151-153, 120 S.Ct. 2097, 147 L.Ed.2d. 105 (2005).

The Circuit Court apparently accepted this legal principle (without ever articulating it), given the amount of energy that it expended attempting to discredit Smyth's statement as inadmissible hearsay.

At any rate, the principle certainly applies in this case. In addition to illustrating discriminatory animus in a powerful manner, Smyth's statement directly contradicts Wagner's post-discharge, stated reason for firing Pennington (declining sales, the need to repair the food truck, Plaintiff's alleged "failure to generate more sales,", etc., TR, P. 222; APX, P. 25).

Furthermore, the Defendants stated reasons for firing Pennington are pretextual because they were never articulated to the Plaintiff (or anybody else, for that matter) while she was employed by the Defendant. Also, they were not

supported by any documentary evidence.

Instead, even Defendant's only witness on the subject, Martha Parrish, testified that Ms. Smyth told her to fire the Plaintiff because of Plaintiff's "personal appearance," and for that reason alone (TR, P. 222, APX, P. 25). There was no contemporaneous discussion of alleged performance problems on Pennington's part.

Such a situation was specifically addressed in the case of *O'Neal v. City of New Albany*, 293 F.3d. 998, 1005-1006 (7th Cir., 2002), in which the Court stated that:

> We have held that when an employer gives one reason at the time of the adverse employment decision but later gives another [reason] which is unsupported by documentary evidence, a jury could reasonably conclude that the new reason was a pretextual, after-the fact justification.

Clearly, the Defendant's post-discharge rationale for firing the Plaintiff did not entitle it to summary judgment in this case, even if it could be said that the Plaintiff had no direct evidence of discriminatory animus.

The Court of Appeals' analysis of this case followed the circumstantial burden of proof model and correctly reached the conclusion that the Plaintiff had proven all that she needed to prove under this model in order to get her case to a jury (APX, Pp. 9-13).

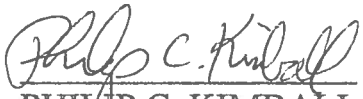
Its decision should be affirmed either under its circumstantial analysis of the

facts of this case or because of the Plaintiff's direct evidence in support of her claims, or under both proof models.

CONCLUSION

For the reasons set forth in this Brief, the Plaintiff/Appellee, Melissa Pennington, requests that this Court affirm the Opinion of the Court of Appeals and remand this case to the Circuit Court for a trial by jury upon her claims.

Respectfully Submitted,



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